TAN CHONG KEAT

v.

PENGURUSAN DANAHARTA NASIONAL BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: P-02-654-2004]
24 APRIL 2008

BANKING: *Securities for advances - Guarantee - Guarantee to secure loan - Certificate of indebtedness - Claim for monies owing - Proof of debt - Plea of manifest error - Whether expressly pleaded*

CIVIL PROCEDURE: *Pleadings - Pleading of particulars - Plea of manifest error - Whether a special plea - Certificate of indebtedness - Rules of the High Court 1980, O. 18 r. 12*

CONTRACT: *Guarantee - Demand for payment - Guarantee to secure loan - Certificate of indebtedness - Proof of debt - Plea of manifest error - Whether expressly pleaded*

This was an appeal by the appellant against the decision of the High Court judge entering judgment in favour of the respondent in respect of a claim for monies owing, together with the interest, against the appellant. The following two grounds were advanced by the appellant in support of this appeal: (i) the claim should have been dismissed by the judge because the respondent had failed to prove the sums claimed by it; and (ii) a certificate of indebtedness of the sums owed by the borrower company to the lending bank – issued pursuant to cl. 13 of a guarantee executed by the appellant – was a useless piece of paper because the documentary evidence before the court had shown a reduction of the rate of interest by the lending bank on more than one occasion. Accordingly, the respondent's own documents produced at trial rendered the certificate of indebtedness so unreliable that the judge was not entitled to act upon it.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The submission advanced by the appellant that the respondent had failed to discharge the burden of proving the sums due to the lending bank from the appellant was without merit. Once the respondent adduced in evidence the cl. 13 certificate of indebtedness, the debt was proved. It was then for the appellant to attack the said certificate on grounds of manifest error. *D&C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors* (foll); *Cempaka Finance Bhd v. Ho Lai Ying & Anor* (foll); *United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor* (dist). (para 7)

(2) Although in para. 1 of his defence, the appellant stated, to use the pleader's words; "the plaintiff's claim is incorrect and does not specify the exact amount claimed, less whatever payments made", nowhere in that pleading was to be found an assertion that the certificate of indebtedness was bad for manifest error. Furthermore, nowhere in the defence had there been any particulars pleaded, disclosing the nature of the alleged manifest error. In the face of this glaring omission, the learned judge could not be faulted for failing to deal with the point. A plea of manifest error is a special plea and in accordance with O. 18 r. 12 of the Rules of the High Court 1980, must be expressly taken. A plaintiff who relies on an account stated or a certificate of indebtedness is entitled, as a matter of natural justice, to know the grounds on which the account or certificate, as the case may be, is challenged on substantial grounds admissible in law. In this instance, since the point was not properly taken by the appellant, it was not open to him now to raise this in his argument in support of his appeal. (para 9)

(3) For the reasons given, the judge was correct in making the orders that he did; the appeal was accordingly without merits. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana memasukkan penghakiman untuk responden dalam satu tuntutan hutang tertunggak dan faedah yang difailkan terhadap perayu. Bagi menyokong rayuan, dua alasan berikut telah dibangkitkan oleh perayu, iaitu: (i) tuntutan harus ditolak oleh yang arif hakim kerana responden gagal membuktikan jumlah terhutang; dan (ii) sijil keberhutangan mengenai hutang yang ditanggung oleh syarikat yang meminjam kepada bank yang memberi pinjaman – yang dikeluarkan di bawah fasal 13 gerenti yang dimeterai perayu – hanyalah sekeping kertas tidak bernilai kerana keterangan dokumentari di hadapan mahkamah menunjukkan beberapa pengurangan kadar faedah telah dibuat oleh bank yang memberi pinjaman. Dengan kata lain, dokumen-dokumen responden sendiri yang dikemukakan semasa perbicaraan telah menyebabkan sijil keberhutangan menjadi sebegitu meragukan sehingga hakim tidak sepatutnya bertindak atas sijil tersebut.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Hujah yang diutarakan perayu bahawa responden gagal melunaskan beban untuk membuktikan jumlah yang terhutang oleh perayu kepada bank pemberi pinjaman adalah tidak bermerit. Sebaik sahaja responden mengemukakan keterangan mengenai sijil keberhutangan di fasal 13, hutang telah dibuktikan. Terpulanglah kepada perayu untuk menyangkal sijil tersebut berdasarkan kesilapan-kesilapan manifestnya. *D&C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd* (diikuti); *Cempaka Finance Bhd v. Ho Lai Ying & Anor* (diikuti); *United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor* (dibezakan).

(2) Walaupun di peranggan 1 pembelaannya, perayu menyatakan, dengan menggunakan perkataan-perkataannya sendiri: "tuntutan plaintif silap dan tidak menetapkan jumlah sebenar yang dituntut, setelah ditolak bayaran-bayaran yang dibuat", tiada suatu pun di pliding tersebut yang mengatakan bahawa sijil keberhutangan adalah cacat kerana kesilapan-kesilapan manifest. Selain itu, pembelaan langsung tidak memplidkan butir-butir yang mendedahkan rupa bentuk kesilapan-kesilapan

tersebut. Berdasarkan ketinggalan-ketinggalan yang amat terserlah ini, yang arif hakim tidak boleh dipersalahkan kerana tidak menangani persoalan tersebut. Pengataan 'manifest error' adalah pengataan yang khusus dan berdasarkan A. 18 k. 12 Kaedah-Kaedah Mahkamah Tinggi 1980, ia hendaklan diplid secara ekspres. Seseorang plaintif yang bergantung kepada akaun yang nyatakan atau kepada sijil keberhutangan berhak, sebagai satu tuntutan keadilan, untuk mengetahui alasan-alasan di mana akaun atau sijil berkenaan dicabar berdasarkan alasan-alasan substantif yang dibenarkan oleh undang-undang. Dalam kes ini, oleh kerana persoalan ini tidak dibangkitkan dengan teraturnya oleh perayu, maka ianya tidak terbuka baginya untuk membangkitkan halperkara itu sekarang bagi menyokong rayuannya.

(3) Atas alasan-alasan yang diberi, hakim betul dalam membuat perintah-perintah yang dibuatnya; rayuan dengan itu tidak bermerit.

Case(s) referred to:

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(foll)***

D&C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors [1990] 2 CLJ 58; [1990] 1 CLJ (Rep) 752 HC ***(foll)***

United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor [2004] 4 CLJ 385 CA ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 12

For the appellant - Dato' Mahinder Singh Dulku (Harjit Singh Sangay with him); M/s Harjit Singh Sangay & Co

For the respondent - Kumar Kanagasingam (Andrew Chiew Ean Vooi & CB Loh with him); M/s Lee Hishammuddin Allen & Gledhill

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-22-1989]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] On 15 June 2004, the High Court of Penang entered judgment against the instant appellant for the following amounts:

(a) the sum of RM6,055,667.15 (Ringgit Malaysia Six Million Fifty Five Thousand Six Hundred Sixty Seven and Fifteen Sen only);

(b) interest at the rate of 10.25% per annum on monthly rest in respect of the first RM5,000,000 and interest at the rate of 12% per annum on monthly rest in respect of the sums above RM5,000,000 starting from 1 October 1988 until the date of filing of this action, that is 12 January 1989; and

(c) interest at the rate of 8% per annum on the sum of RM6,055,667.15 starting from 13 January 1989 until the date of full settlement.

Costs were also awarded. The appellant appealed against that judgment to us. On Monday, 21 April 2008, this court was moved on an application for a stay of the above judgment. Upon being informed that the record of appeal has been filed since 2004, we directed that the appeal proper to be heard today and adjourned the motion for stay be taken together with the appeal. The appeal now having been fully argued on its merits, the motion is rendered academic. We accordingly dismiss it with no order as to costs.

[3] A number of grounds were taken in the court below to resist the claim taken by the respondent against the appellant. Only two of these have been pursued in the appeal this morning. In order to appreciate the arguments advanced on the points taken, it is necessary to briefly recite the factual background against which this appeal rests.

[4] On 11 November 1986, Ban Hin Lee Bank Berhad lent a sum of RM5,000,000 to a company called Island Hill Sdn. Bhd. According to the bank's letter of offer dated 18 September 1986, the rate of interest to be charged was 3.25% above the bank's base lending rate. It was also a condition of the loan that if the approved limit of RM5,000,000 is exceeded, penalty interest at the rate of 6.75% above the bank's base lending rate would be charged. The aforesaid loan was secured, *inter alia*, by a guarantee executed by the appellant herein dated 11 November 1986. Later, the borrower company having made default, the bank brought an action to recover all sums due to it from both the borrower and the appellant. Later still, due to the economic downturn that took place in 1997, the securities taken by the bank were vested in the

instant respondent by statute, namely the Pengurusan Danaharta Nasional Berhad Act 1998. The bank moved for summary judgment and succeded at first instance against both the borrower company and the instant appellant. However, this court on an appeal by the appellant set aside the summary judgment entered against him, dismissed the summons for judgment and gave him unconditional leave to defend. The action then proceeded to trial. On the first day of trial, the title to the action and the pleadings were amended to reflect the vesting that had taken place in the respondent. After hearing witnesses called by both sides and after a consideration of the documentary evidence produced before him, the learned judge who heard the action entered judgment against the appellant in the terms already adverted to. So much for the facts. We now turn to address the two submissions advanced in support of this appeal.

[5] The first argument is that the claim should have been dismissed by the learned judge because the respondent had failed to prove the sums claimed by it. Learned counsel for the appellant drew our attention to the well-settled principle that a litigant who asserts must prove. In support of his case, the appellant relies on the decision of this court in *United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor* [2004] 4 CLJ 385. There, the High Court dismissed the bank's claim on the ground that the bank had failed to prove the guarantor's liability to it. It is clear from the report of the judgment that the bank in that case had produced only scanty and unsatisfactory evidence as proof of the guarantor's indebtedness. Learned counsel for the instant respondent has argued that the present instance is clearly distinguishable from *United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor.* He has submitted that unlike that case, the instant respondent had produced a certificate of indebtedness of the sums owed by the borrower company to the lending bank. The said certificate was issued pursuant to cl. 13 of the guarantee which the appellant executed. Clause 13 states that:

> A statement signed by your manager, sub-manager, secretary or any one of your officers as to the moneys and liabilities for the time being due or incurred to you from or by the Customer (that is to say the borrower company in the instant case) shall be final and conclusive evidence against me/us for all purpose.

[6] We are in agreement with the submission of the learned counsel for the respondent. It is supported by an unbroken line of authorities, the most recent of which is the decision of the Federal Court in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544. The principle under consideration was set out by VC George, J (as he then was) in *D&C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors* [1990] 2 CLJ 58; [1990] 1 CLJ (Rep) 752 as follows:

> ... it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the 1st defendant.
>
> In the instant case, there is such a certificate of indebtedness under the hand of an authorised officer of the plaintiff bank. The judgment of Shankar J in *MIMB v. G & C Securities* (unreported) and the judgment of *Bank Bumiputra v. Doric Development Sdn. Bhd.* [1988] 1 MLJ 462, at page 463 provided authority for the proposition that such a certificate is indeed binding unless there is manifest error.

[7] It follows, in our judgment, that the submissions advanced by the appellant that the respondent had failed to discharge the burden of proving the sums due to the lending bank from the appellant is without merit. Once the respondent adduced in evidence the cl. 13 certificate of indebtedness, the debt was proved. It was then for the appellant to attack the said certificate on grounds of manifest error. And that brings us to the second argument made before us.

[8] Learned counsel for the appellant submitted that the cl. 13 certificate of indebtedness was a useless piece of paper because the documentary evidence before the court had shown a reduction of the rate of interest by the lending bank on more than one occasion. Accordingly, the respondent's own documents produced at trial rendered the certificate of indebtedness so unreliable that the judge was not entitled to act upon it.

[9] Although in para. 1 of his defence, the appellant stated, to use the pleader's words; "the plaintiff's claim is incorrect and does not specify the exact amount claimed, less whatever payments made", nowhere in that pleading is to be found an assertion that the certificate of indebtedness was bad for manifest error. Further, nowhere in the defence have there been any particulars pleaded,

A disclosing the nature of the alleged manifest error. In the face of this glaring omission, the learned judge cannot be faulted for failing to deal with the point. A plea of manifest error is a special plea, and in accordance with O. 18 r. 12 of the Rules of the High Court 1980 must be expressly taken. A plaintiff who relies on an
B account stated or a certificate of indebtedness is entitled, as a matter of natural justice, to know the grounds on which the account or certificate, as the case may be, is challenged on substantial grounds admissible in law. In our judgment, since the point was not properly taken by the appellant, it is not open to
C him now to raise this in his argument in support of his appeal.

[10] For the reasons already given, we are satisfied that the learned judge was correct in making the orders which he did. The appeal is accordingly without merits. The appeal is dismissed. The
D appellant must pay the costs of the appeal. The deposit paid into court shall be paid out to the respondent to account of its taxed costs. For completeness, we affirm all orders made by the High Court.

E

F

G

H

I